WILDERNESS WATCH

IBLA 2001-313 Decided November 8, 2001

Appeal from a decision of the California Desert District Manager, Bureau of Land Management, issuing a land use permit authorizing motorized access to a private inholding. CA-42158.

Affirmed.

1. California Desert Protection Act of 1994: Generally--Public Lands: Special Use Permits--Special Use Permits

   The drilling of a water well on a private inholding to supply a source of water to support camping within the inholding and the use of the land for the purpose of stargazing are "reasonable" uses of the land within the meaning of § 708 of the California Desert Protection Act of 1994, 16 U.S.C. § 410aaa-78 (1994).

2. California Desert Protection Act of 1994: Generally--Public Lands: Special Use Permits--Special Use Permits

   Under the express provisions of § 519 of the California Desert Protection Act, 16 U.S.C. § 410aaa-59 (1994), rules and regulations applicable solely to Federal lands within the boundaries of wilderness areas established by that Act are not applicable to private inholdings unless or until such inholdings are acquired by the United States.

3. California Desert Protection Act of 1994: Generally--Public Lands: Special Use Permits--Special Use Permits

   So long as BLM provides "adequate" access to inholdings within the meaning of § 708 of the California Desert Protection Act of 1994, 16 U.S.C. § 410aaa-78 (1994), the degree and manner of access provided is within BLM's sound discretion.

APPEARANCES: Tina Marie Ekker, Policy Director, Wilderness Watch, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Wilderness Watch has appealed from a decision of the California Desert District Manager, Bureau of Land Management (BLM), dated May 21, 2001, issuing a land use permit to Jesse M. McKeever (CA-42158) for the purpose of obtaining motorized access to private property owned by McKeever located within the boundaries of the Palen-McCoy Wilderness Area. Together with its notice of appeal, Wilderness Watch has also submitted a petition seeking to have this Board stay the decision below as provided by 43 CFR 4.21(b). For reasons set forth below, we have determined to affirm the decision of BLM and accordingly reject the petition for stay.

McKeever had applied for a land use permit on April 1, 2000, seeking motorized access from the Palen Valley Road along an existing vehicle way to his private inholdings in sec. 36, T. 3 S., R. 17 E., San Bernardino Meridian. The motorized access would traverse approximately 1.3 miles of the wilderness area. The purpose of the requested access, as stated by McKeever in his application, was to allow both a single motorized entry for the drilling of a water well for camping convenience, which was estimated would take between two to three days, and one additional entry to deliver a 500 gallon storage tank. McKeever also sought permission for a weekly entry to transport a 500-pound home-built reflecting telescope for the purpose of stargazing. In a separate statement accompanying his application, McKeever noted that the vehicle way was an old mining road over extremely hard land which would show little signs of wear and he also noted that he had used the vehicle way to access his land until it was posted as closed to motorized access approximately five years earlier. It should be noted that the purpose of the requested access was subsequently expanded by McKeever so as to encompass the transport of a camping trailer to his property during periods of inclement weather.

Subsequent to the receipt of this application, BLM mailed a notice of proposed action (NOPA) to interested members of the public to obtain their comments on the McKeever application. Wilderness Watch responded to the NOPA in comments dated August 3, 2000, generally opposing the application. BLM thereafter prepared an environmental assessment (EA 660-00-45). This EA analyzed in depth both the proposal by McKeever and a "no action" alternative. It also briefly considered the use of a helicopter to access the private lands and the possible storage of the telescope on McKeever's property (which would vitiate the need for motorized access to transport the telescope both to and from McKeever's property whenever its use was desired). However, helicopter access was deemed uneconomic in light of the recreational nature of the use intended, while the possibility of storing the telescope on-site was rejected because the construction and maintenance of "a permanent structure substantial enough to secure and protect a large and expensive instrument would potentially involve a greater impact to wilderness values" than the access proposed by McKeever. EA at 5.

Insofar as anticipated adverse effects from the proposed action were concerned, the EA concluded that the proposed action would have an adverse effect on the wilderness characteristics of the area traversed by the vehicle way, though these impacts were generally seen as minor, particularly in light of various stipulations which were recommended for inclusion in the permit. See generally EA at 9-11. Impacts on wildlife (including the desert tortoise), water quality, and riparian values were determined to be minimal. Id. at 11-12.

On April 20, 2001, the District Manager issued a decision record approving issuance of a land use permit for a term of three-years which authorized motorized access to McKeever's private property, subject to numerous conditions and restrictions. Included within this decision record was a finding that the proposed action would have no significant impact on the environment (FONSI) within the meaning of § 102(2)(c) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1994). In the decision record, the District Manager noted:

> Jesse McKeever's proposed projects and activities on his property within the Palen-McCoy Wilderness for which motorized access has been requested on the existing way are legal and reasonable uses of private lands. The use and enjoyment on the property through establishment of a water well, the use of a large telescope for amateur astronomy, and periodic transport of a camping trailer require motorized access. Due to the scope of proposed activities and the nature of existing access, motorized use of the existing access route is the minimum tool for reasonable use and enjoyment as described. Denial of the permit would not provide Mr. McKeever the reasonable use and enjoyment of his land as required by Section 708 of the California Desert Protection Act of 1994.

Decision Record at 1. The referenced section of the California Desert Protection Act (CDPA) provides that "[t]he Secretary shall provide adequate access to nonfederally owned land or interests in land within the boundaries of the conservation units and wilderness areas designated by this subchapter which will provide the owner of such land or interest the reasonable use and enjoyment thereof." 16 U.S.C. § 410aaa-78 (1994).

[1] In its challenge to the proposed action, Wilderness Watch strenuously argues that BLM erred by equating "reasonable use" of inholdings with "any legal use" of such lands, citing statements BLM made in its EA. See EA at 13-14. Certainly, one could argue that the mere fact that a specific use of land is legal does not, ipso facto, make that use reasonable. However, one need not embrace any theory equating legal use with reasonable use to conclude that the use sought by McKeever herein is a "reasonable" use of his private property.

Wilderness Watch asserts that the fact that numerous individuals who use wilderness areas "can and do carry water on their backs that is sufficient for sustaining them during a 1.3-mile hike and overnight camping" and that such individuals "can and do enjoy wilderness camping without need of

a camp trailer" shows that McKeever's request is not reasonable. See Statement of Reasons (SOR) at 7. In our view, however, the fact that others may use the public lands without the amenities sought by McKeever is simply irrelevant to whether McKeever has a reasonable right to use his private lands in the fashion which he seeks. What Congress clearly sought to do in adopting § 708 of the CDPA was afford inholders greater rights of ingress and egress than that afforded the general populace. Indeed, even appellant recognizes that § 708 of the CDPA is a statutory grant of an access right to inholders that is broader than that afforded by § 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a) (1994). Id. at 4. Congress has decreed that, where an inholder desires to make a "reasonable" use of his or her property, the managing agency is required to afford access across the wilderness area "adequate" to facilitate that use. This requirement exists notwithstanding the fact that the "adequate" access allowed might otherwise be prohibited under the CDPA.

Wilderness Watch claims that BLM's interpretation of § 708 of the CDPA conflicts with that espoused by the National Park Service (NPS), noting that an appendix to the Land Protection Plan for the Joshua Tree National Park, approved by the NPS Regional Director, defines "reasonable use and enjoyment" as "[u]se that is based on contemporaneous uses of similarly situated lands that are in the conservation unit." (SOR at 8.)

Whether the definition employed by NPS in this document meets the statutory mandate is certainly open to question, inasmuch as the statutory language in no way limits "reasonable" uses to those occurring contemporaneously on lands within the same conservation unit. Moreover, in our view, use of McKeever's land for camping and viewing stars is altogether similar to contemporaneous uses of adjacent lands in the wilderness. In any event, the definition espoused in this document is not a rule within the meaning of 5 U.S.C. § 553 (1994), and, accordingly, is not binding on BLM, or on this Board or on the public at large (see generally Morton v. Ruiz, 415 U.S. 199, 235 (1974); Pamela Neville, 155 IBLA 303, 309 (2001)), and we expressly hold that McKeever's proposed use is reasonable within the meaning of § 708 of the CDPA.

[2] Wilderness Watch asserts that, contrary to BLM's stated position, BLM does possess authority to regulate uses of private lands located within the wilderness area. In the EA, BLM had declared that "[i]n general, BLM does not regulate uses on private lands." EA at 13. Appellant argues that BLM's reliance on § 103(d) of CDPA, 108 Stat. 4481, which prohibits "buffer zones," to support its position is misplaced. See SOR at 9.

In the EA, BLM referenced language in § 103(d) which provided that "[t]he fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area." Focussing on the phrase "of itself," Wilderness Watch argues that while, under this section, the mere fact that impacts from private lands were felt on Federal lands within the wilderness would not preclude allowing such impact-generating activities, this provision did not prevent the appropriate Federal agency

from taking its own independent "hard look" to determine whether the uses of private lands were reasonable in analyzing whether or not access under § 708 should be provided. See SOR at 9-11. Wilderness Watch contends that, given the purposes for which the wilderness was established, any use of private inholdings which is contrary to the purposes which animated the establishment of the wilderness is subject to regulation by BLM. Id. at 11.

In our view, however, not only do the provisions of § 103(d) undercut Wilderness Watch's argument, but the provisions of § 519 of the CDPA, 16 U.S.C. § 410aaa-59 (1994), make it crystal clear that Congress expressly eschewed granting BLM any such power to regulate activities on private lands so as to conform them to the purposes for which the wilderness was established. Section 519 provides, in relevant part:

> Unless and until acquired by the United States, no lands within the boundaries of wilderness areas or National Park System units designated or enlarged by this subchapter that are owned by any person or entity other than the United States shall be subject to any of the rules or regulations applicable solely to the Federal lands within such boundaries and may be used to the extent allowed by applicable law.

Id. The clear language of this provision disposes of appellant's argument to the contrary.

[3] Turning to the question of whether the access afforded by BLM is "adequate" within the meaning of § 708 of the CDPA, Wilderness Watch argues that the regulatory definition found at 43 CFR 6305.10(a)(1) improperly equates "adequate access" with "routes and modes of travel" that BLM determines existed at the time that the wilderness area was established. This, appellant argues, may be overbroad in allowing use of routes which, while existing at the time of the establishment of the wilderness area, are not presently needed to provide "adequate access" to an inholding, while at the same time the regulatory definition might prove too restrictive by limiting all access in those situations in which no previous access existed. See SOR at 12.

Wilderness Watch contrasts this new interpretation, which was adopted effective January 16, 2001 (see 65 F.R. 78358, 78376 (Dec. 14, 2000)), with the regulatory definition formerly found at 43 CFR 8560.0-5(a) which was removed coincident with the adoption of 43 CFR Part 6300. This earlier regulation provided that:

> Adequate access means the combination of routes and modes of travel to non-Federal inholdings that will, as determined by the authorized officer, serve the reasonable purposes for which the non-Federal lands are held or used, and at the same time, cause impacts of least duration and degree on their wilderness character.

43 CFR 8560.0-5(a) (2000).

While, as a theoretical matter, appellant may be correct in arguing that any definition which equates "adequate access" with "historic access" may run the risk of simultaneously being too broad and too narrow, its argument fails within the confines of this appeal for two discrete reasons. First of all, it is questionable whether the regulatory definition set forth at 43 CFR 6305.10(a)(1) is even applicable herein. In promulgating the regulations at 43 CFR Part 6300, the Assistant Secretary noted that:

> One comment stated that the proposed rule did not consider the special provisions of the California Desert Protection Act of 1994 * * *. The special provisions of that Act apply only to those BLM-managed areas designated as wilderness in the California Desert Protection Act. It would be inappropriate for a regulation with nationwide effect to implement these special provisions. These special provisions in the Act stand alone, and do not need regulations to make them effective. If any aspect of these regulations were inconsistent with the special provisions of the California Desert Protection Act, that Act would prevail over these regulations to the extent of the inconsistency.

65 F.R. 78359 (Dec. 14, 2000) (emphasis supplied). Thus, to the extent that the regulations set forth at 43 CFR 6305.10(a)(1) are ultimately deemed to afford access broader or narrower than that provided by the CDPA, it is the latter which controls. Thus, the question dissolves itself into whether the access provided by BLM herein is in accord with the dictates of the Act. And, as far as that question is concerned, we have no difficulty concluding that it is.

Second, Wilderness Watch essentially confuses what is a requirement imposed upon BLM that it afford adequate access so as to allow the owners of inholdings the reasonable use and enjoyment of their land with a limitation on BLM's authority to grant access to such inholdings. Section 708 does not provide that BLM may authorize nothing more than "adequate" access; rather, it requires BLM to provide at least adequate access. In our view, so long as BLM provides "adequate" access to inholdings within the meaning of § 708 of the California Desert Protection Act of 1994, 16 U.S.C. § 410aaa-78 (1994), the degree and manner of any access provided is within BLM's sound discretion. Nothing which appellant has submitted would support a finding that BLM has exercised this discretion unreasonably or improperly.

Wilderness Watch also argues that BLM inadequately considered possible alternatives to McKeever's proposed motorized access, objecting to what it termed the "cursory" nature of BLM's analysis of proposals to allow for a one-time motorized or helicopter access to the site to transport the telescope and storage thereafter in a shed on McKeever's private property as well as the use of helicopter access for the drilling of a water well. See SOR at 13-14.

Insofar as the proposed alternative which would permit a single entry (be it by motorized means or by helicopter) and then require the permanent storage of the telescope on McKeever's private property is concerned, the EA noted that:

> Requiring the proponent to construct a permanent structure substantial enough to secure and protect a large and expensive instrument would potentially involve a greater impact to wilderness values. The amount of motorized access required to build and maintain such a structure could involve more motorized access in wilderness than in the proposed action. The addition of what would essentially be a new permanent structure would also degrade the quality of the inholding as potential wilderness through future acquisition.

EA at 5. The EA makes it clear that BLM did consider the possibility of requiring the storage of the telescope on McKeever's private inholdings but rejected it for various reasons. That appellant may disagree with BLM's actions in rejecting this alternative is not so much the result of what appellant deems to be the "cursory" nature of BLM's consideration as it is the ultimate conclusion which BLM reached. It is a conclusion, however, which we deem to be supported by the record.

With respect to the suggested alternative that BLM limit any access for purposes of drilling a well only to helicopter access, we note that, in its response to the petition for stay, BLM stated that it had raised this possibility with McKeever and that he had rejected it as infeasible on the grounds of cost. See BLM Response at 2. BLM further observed that "[a]s a well driller by trade, his ability to use his own equipment and labor to drill his water well is not indicative of his ability to afford helicopter transport." Id. We believe that this response shows that BLM sufficiently considered this suggestion, particularly in light of the limited impacts on the wilderness disclosed by the EA's analysis of McKeever's proposal to access his private property along the existing vehicle way for the purpose of drilling a well. See EA at 9-12, 14-15.

Finally, to the extent that appellant suggests that BLM failed to adequately provide opportunities for public comment, the record simply does not bear this out. While it is true that the EA was not released for public comments prior to the issuance of the FONSI, BLM had sent the NOPA to interested parties, including appellant. In commenting on this proposal, Wilderness Watch suggested that the telescope be helicoptered in or that a horse-drawn transport be utilized for a single entry to deliver the telescope to McKeever's property. See Letter of August 3, 2000, at 2-3. Similarly, Wilderness Watch objected to any permission for motorized access for the purpose of drilling a water well. Id. Indeed, the comments submitted and objections raised by appellant at that time are substantially identical with those raised in this appeal, which was initiated after issuance of the decision record and FONSI. Inasmuch as, for reasons provided above, we find these substantive assertions unavailing, appellant was clearly not adversely affected by a failure of BLM to elicit comments prior

to issuance of the FONSI, even if we were to agree that BLM was required to do so.

In short, we find the actions complained of to be fully in accord with the applicable provisions of both the CDPA and the applicable regulations and reject the instant appeal. It follows that the petition for stay filed with the appeal must be and is hereby rejected as moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge